Morgan Lewis

James J. Dragna
Partner
+1.213.680.6436
jim.dragna@morganlewis.com

May 2, 2016

VIA FEDERAL EXPRESS

Nicoletta Di Forte
Deputy Director for Enforcement
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region II
290 Broadway
New York, N.Y. 10007-1866

Re: Lower 8.3 Miles of Lower Passaic River: Notice of Potential Liability and Opportunity for Cash-out Settlement

Dear Ms. Di Forte:

I write on behalf of Celanese Ltd. and its affiliates ("Celanese") to acknowledge receipt of U.S. EPA's March 31, 2016 Notice of Potential Liability under 42 U.S.C. § 9607(a) and to request that U.S. EPA include Celanese in future discussions regarding cash out settlements. As we previously advised U.S. EPA Regional Counsel and as explained below, Celanese is eligible for a *de minimis* cash out settlement under 42 U.S.C. § 9622(g)(1)(A).

Background

U.S. EPA first notified Celanese more than a decade ago that Celanese "may be potentially liable . . . for response costs relating to the study of the Lower Passaic River."[1] U.S. EPA requested in its general notice letter to Celanese that Celanese become a "cooperating party" and join with other cooperating parties to fund EPA's study costs, which Celanese

[1] 09/15/2003 Letter from G. Pavlou to H. Benz at 2.

Morgan, Lewis & Bockius LLP

355 South Grand Avenue, Suite 4500
Los Angeles, CA 90071-3107
United States
T +1.213.680.6400
F +1.213.680.6499

did.[2] In 2007, Celanese further agreed to join with approximately 70 other cooperating parties to perform the Remedial Investigation and Feasibility Study for the entire 17 miles of the Lower Passaic River Study Area (LPRSA). In 2012, Celanese again agreed to join with other cooperating parties to perform a Removal Action at River-Mile 10.9 of the LPRSA. To date, Celanese and the other cooperating parties have spent more than $120,000,000 to address contamination in the LPRSA, without any determination of liability or opportunity to pursue a settlement commensurate with their alleged liability.

Grounds for *De Minimis* Settlement

Under the criteria set forth in Section 122(g)(1)(A), Celanese is eligible for a *de minimis* settlement. Section 122(g)(1)(A) provides, in pertinent part, that U.S. EPA "shall as promptly as possible reach a final settlement with a potentially responsible party. . . if such settlement involves only a minor portion of the response costs at the facility concerned and . . . [b]oth of the following are minimal in comparison to other hazardous substances at the facility . . . (i) [t]he amount of the hazardous substances contributed by that party to the facility . . . .[and] (ii) the toxic or other hazardous effects of the substances contributed by that party to the facility." 42 U.S.C. § 9622(g)(1)(A). As U.S. EPA Guidance notes, such settlements are favored because they reduce transaction costs for the government and the settling parties, they provide funding for remedial work, they provide an incentive for non-*de minimis* parties to settle, and they reduce the total number of parties involved.[3] Indeed, such settlements are "most beneficial at sites with numerous PRPs," such as the LPRSA.[4]

Application of *De Minimis* Settlement Criteria to Celanese

EPA's ROD for the Lower Eight Miles of the LPRSA identifies eight contaminants of concern: dioxins and furans, PCBs, mercury copper, lead, the pesticides DDT and dieldrin, and PAHs. Celanese's operations in Newark are not associated with a discharge of any of these substances to the LPRSA. The hazardous substances Celanese could have contributed to the LPRSA no longer persist in the environment and are not associated with the human health and ecological risks driving the response actions for the LPRSA. Therefore, the amount and toxicity of Celanese's alleged contribution of hazardous substances to the LPRSA are minimal by comparison such that Celanese is eligible for a *de minimis* settlement under Section 122(g)(1)(A).

---

[2] *Id.*

[3] Methodologies for Implementation of CERCLA Section 122(g)(1)(A) De Minimis Waste Contributor Settlements (Dec. 20, 1989, OSWER Directive 9834.7-1B) at 2-3.

[4] Interim Guidance on Settlements with De Minimis Waste Contributors under Section 122(g) of SARA (June 19, 1987) at 12.

(a) 354 Doremus Avenue

In its September 2003 general notice letter to Celanese, U.S. EPA advised Celanese that it was potentially liable for response costs related to the LPRSA based on alleged releases from a facility at 354 Doremus Avenue in Newark, New Jersey. Celanese is not, however, responsible for any response costs that might be attributed to releases of hazardous substances from the 354 Doremus Avenue facility.

The chemicals that Celanese stored or manufactured at 354 Doremus Avenue, from 1954 through 1996, included organic acids, acetates, acrylates, glycols, and formaldehyde, none of which are persistent in the environment and none of which have been identified as contaminants of concern in the LPRSA. Beyond that, the Essex County Improvement Authority (ECIA), which purchased the property in 1998, agreed to assume all environmental liabilities related to this property. Pursuant to that agreement, ECIA has assumed full responsibility for response costs related to the LPRSA attributed to releases from this facility and has sought to enter into the administrative settlements with EPA for both the 17-mile Remedial Investigation and Feasibility Study and the River Mile 10.9 Removal Action. In short, Celanese is not responsible for hazardous substances released from 354 Doremus Avenue to the LPRSA and *none* of the chemicals Celanese stored or manufactured at this facility have been identified as chemicals of concern in the LPRSA.[5]

(b) 290 Ferry Street

Although not identified by U.S. EPA as a source of releases to the LPRSA, another facility in Newark that Celanese owned and operated at 290 Ferry Street from 1927 to 1973 has been identified as a potential source of contamination to the LPRSA. This facility was located approximately one third of a mile from the LPRSA, and only manufactured celluloid and cellulose acetate products. The chemicals used in these manufacturing processes, which primarily included cellulose, acids, alcohols, solvents, camphor, and Lindol, do not persist in the environment and none of these substances are among the contaminants of concern for the LPRSA. Diemethyl phthalate and diethyl phthalate, which may have been used as a plasticizer, have been found in soils at the facility, but are rarely detected in LPRSA sediments and have not been identified as a chemical of concern for the LPRSA. Petroleum hydrocarbons also have been detected in soils at the site, but are believed to be associated with on-site underground storage tanks and are highly unlikely to

[5] In an April 20, 2016 email to Ms. Sarah Flanagan in the Office of Regional Counsel, ECIA acknowledged that ECIA is the "indemnitor to Celanese for alleged CERCLA liabilities . . . associated with the Doremus Site" and asserted that "ECIA believes that both it and Celanese are eligible for de minimis treatment in connection with the Doremus Site."

be a source of any PAHs released to the LPRSA in light of the distance of the facility from the LPRSA.

* * *

Although Celanese did not contribute any of the contaminants of concern to the LPRSA, Celanese has cooperated with U.S. EPA since 2007 in seeking to address contamination in the LPRSA. Because its alleged liability for contamination in the LPRSA is *de minimis* in nature, Celanese respectfully requests that it be included in future discussions with U.S. EPA concerning cash out settlements.

Sincerely,

James J. Dragna

cc: Juan Fajardo
Sarah Flanagan
Duke K. McCall, III